UNITED STATES BANKRUPTCY COURT

DISTRICT OF HAWAII

In re	)	Case No. 03-02804
	)	Chapter 11
PUMEHANA PARTNERS, a Hawaii general partnership,	)	
	)	Re: Docket No. 289
Debtor.	)	

MEMORANDUM DECISION ON
<u>MOTION FOR RESOLUTION OF DISPUTED TRUSTEE ELECTION</u>

McCully Associates, through its state-court-appointed receiver, filed a Motion for Resolution of Disputed Trustee Election on March 25, 2004. The motion was heard on April 19, 2004, and I took the matter under advisement.

This bankruptcy case is an offshoot of long-running, complex, and expensive litigation in the state court involving members of the Marn family and business entities which they own, including Pumehana Partners, the debtor here, and McCully Associates. The Receiver has been operating McCully Associates for some time while bitter litigation among the Marns and their companies has continued (and probably intensified).

Two of its four general partners filed an involuntary chapter 11 petition against Pumehana Partners on September 22, 2004. An order for relief was entered on October 21, 2003. On January 9, 2004, I directed the appointment of a chapter 11 trustee. The Office of the United States Trustee appointed Ronald K. Kotoshirodo to serve as interim trustee.

On February 5, 2004, the Receiver of McCully Associates requested an election to select a trustee. The Office of the United States Trustee conducted the election on March 8, 2004. The Receiver asserted an unsecured claim totaling $867,926.68 and voted in favor of Allen Kubota. Three other creditors with claims aggregating $81,712.96 voted in favor of the interim trustee, Mr. Kotoshirodo. The debtor and one of its general partners, Eric Marn, have objected to some of the Receiver's claims and have challenged the Receiver's right to vote. No one has challenged the right of the other three creditors to vote.

The Receiver contends that Eric Marn lacks standing to contest the election. Mr. Marn is a "party in interest" who is entitled to "raise and . . . appear and be heard on any issue" in a chapter 11 case. See 11 U.S.C. § 1109(b). While the court may limit the ability of certain parties to participate in particular disputes because the outcome of those disputes would not "aggrieve" them, in this case Mr. Marn has a concrete stake in the selection of a trustee. This estate may very well be solvent and may produce a return for its partners, such as Mr. Marn. (The outcome of a hotly contested partnership accounting will likely determine the extent to which each partner will share.) Mr. Marn therefore has a direct and cognizable interest in the selection of the person who will administer the estate.

11 U.S.C. § 702(a) specifies the creditors who can vote to elect a trustee:

> A creditor may vote for a candidate for trustee only if such creditor –
>
> (1) holds an allowable, undisputed, fixed, liquidated, unsecured claim of a kind entitled to distribution . . . .
>
> (2) does not have an interest materially adverse, other than an equity interest that is not substantial in relation to such creditor's interest as a creditor, to the interest of creditors entitled to such distribution; and
>
> (3) is not an insider.

The first question is whether and to what extent the Receiver's claims satisfy the test of section 702(a)(1). The Receiver has filed three proofs of claim, one of which consists of several separate claims.

Claim No. 3 includes a claim for $25,000 (plus interest of $3,958.25) for a working capital advance by McCully Associates to Pumehana Partners. Mr. Marn has not objected to this portion of the claim and agrees that it meets the test for voting.

The second part of Claim No. 3 consists of other advances allegedly made to Pumehana Partners by McCully Associates and expenses of Pumehana Partners that McCully Associates paid. Mr. Marn correctly argues that this portion of the claim is not "undisputed" for purposes of section 702(a)(1). The definition of "undisputed" in section 702(a)(1) is itself the subject of a dispute. Some courts apply a low standard and hold that a claim which is subject to a non-frivolous objection is not "undisputed." See In re Williams, 277 B.R. 114 (Bankr. C.D. Cal. 2002); and In re San Diego Symphony Orchestra Ass'n, 201 B.R. 978 (Bankr. S.D. Cal. 1996). The Receiver argues that a somewhat higher standard applies. He urges the court to determine whether the dispute is "bona fide," meaning that "there is an objective basis for either a factual or a legal dispute as to the validity of the debt." Compare In re Vortex Fishing Systems, Inc., 277 F.3d 1057, 1064 (9th Cir. 2001) (applying section 303). This portion of Claim No. 3 is not "undisputed" under any definition of the word. The intercompany and inter-partner accounts among the Marn family and its companies are the subject of protracted, intense, and unresolved litigation. The affairs of the Marns and their companies are sufficiently entangled that the parties have spent years and untold amounts of money on litigation and still have not resolved the issues. This portion of Claim No. 3 is not "undisputed."

The third and final portion of the claim consists of fees claimed for management services rendered by McCully Associates to Pumehana Partners. There is no dispute that McCully Associates in fact provided all of the management and administrative services which Pumehana Partners required, and the managing partner of Pumehana Partners acknowledged at least once that Pumehana Partners should compensate McCully Associates for its services. There apparently was no agreement, however, on the amount of the compensation and there is also a good faith argument that a portion of the claim is time-barred. Therefore, this portion of the claim is not "undisputed."

Claim No. 9, in the amount of $44,410.85, represents payments made by McCully Associates for legal services rendered to Pumehana Partners. The parties disagree about whether the legal services were exclusively for the benefit of Pumehana Partners and whether some portion of them are properly chargeable to some members of the Marn family. I need not resolve this dispute because, even if this entire claim qualifies under section 702(a), it would not affect the outcome of the election.

Claim No. 10 asserts a claim in an "estimated" amount of $300,000, representing the portion of the fees and expenses charged by a "business master" appointed by the state court and his professionals that, according to the Receiver, should be charged to Pumehana Partners. This claim is unliquidated on its face (and, although no one has objected to it yet, it is probably also disputed). The amount of this claim will be determined only after a full accounting of the companies' and the Marn family's joint affairs. A claims such as this one, which is not subject to "ready determination and precision in computation of the amount due," In re Fostvedt, 823. F.2d 305 (9th Cir. 1987), is "unliquidated" for purposes of section 702(a)(1).

Mr. Marn and the debtor also contend that the Receiver's claims cannot be counted under sections 702(a)(2) and 702(a)(3). These arguments turn on difficult issues of statutory interpretation which I need not address. Even assuming that Claim No. 9 is "undisputed," the total amount of the Receiver's claims which satisfy the requirements of section 702(a)(1) is $73,369.10. This is less than the total amount of the claims which were voted in favor of Mr. Kotoshirodo. Therefore, even if the Receiver's claims meet the requirements of sections 702(a)(2) and 702(a)(3), Mr. Kotoshirodo has been elected. See § 702(c)(2).

Accordingly, a separate order will be entered determining that Mr. Kotoshirodo has been elected to serve as trustee.

DATED: Honolulu, Hawaii, April 20, 2004.

/s/ Robert J. Faris
United States Bankruptcy Judge